

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

4 -----)

5 JOHN C. PRATHER,)

6 Plaintiff,)

7 v.) No. C 09-2457 CRB

8 AT&T, INC., et al.,)

9 Defendants.) San Francisco, California

10 -----) Friday, September 13, 2013

(30 pages)

11

12 TRANSCRIPT OF PROCEEDINGS

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1 Thursday, September 5, 2013

2 (10:28 a.m.)

3 (In open court)

4 **DEPUTY CLERK:** Calling Case C 09-2457, John Prather
5 vs. AT&T.

6 Appearances, Counsel.

7 **MR. BLAVIN:** Jonathan Blavin for defendant Cellco
8 Partnership, d/b/a Verizon Wireless.

9 **MR. BARNIDGE:** Edward Barnidge for defendant Sprint
10 Nextel.

11 **MR. SINGH:** Arand Singh on behalf of AT&T.

12 **MR. AXEL:** Douglas Axel, also for AT&T.

13 **MR. TAYLOR:** David Taylor for defendants Qwest and
14 Sprint.

15 **MR. BALESTRIERE:** John Balestriere, along with my
16 cocounsel David Miclean, here for John Christopher Prather,
17 who is in the courtroom and available if needed.

18 **THE COURT:** So this case is in front of me now since
19 the interesting and perhaps somewhat difficult question as to
20 whether or not the relator is entitled to be compensated as a
21 qui tam action -- right? Does he meet that qualification?

22 **MR. BALESTRIERE:** Is he an original source, yes, your
23 Honor.

24 **THE COURT:** So we're all on the same page. And -- in
25 part. And what I'd like to hear some discussion about this

1 morning is whether -- one question I have is whether he loses
2 his original source status by virtue of the fact that his
3 supervisor -- is it the Attorney General's Office, State
4 Attorney General's Office?

5 **MR. BALESTRIERE:** Yes, your Honor. I think the job
6 that he had the most that's been before the Court is the
7 Organized Crime Task Force, where the supervisor essentially
8 was the Attorney General.

9 **THE COURT:** Okay. Whether he was, as part of his
10 duties, required to submit an affidavit in which a member of
11 the -- in which some of the information upon which he bases
12 his claim as being the original source was disclosed, at least
13 in some form -- obviously not the form that it ultimately was
14 litigated, I guess. And that's the question. And he says, as
15 I understand, or you say in your papers, no, really, this
16 wasn't his task. And therefore the fact that he did submit
17 this document in response to a request doesn't disqualify him.
18 And maybe you want to say it better than I've just said it.
19 There we are. If you do, go right ahead.

20 **MR. BALESTRIERE:** No, you're right, your Honor. We
21 cited to the New York Executive Law 70 A1 -- it's in our
22 papers -- which did lay out what his duties were, and they
23 were to conduct multi county or multi state organized crime
24 investigations. He ended up first making his disclosure to
25 the government, actually, in 1999, when he spoke to people at

1 OCTF, the Organized Crime Task Force. He also, between that
2 time and 2004, which is what your Honor's talking about, the
3 submissions to the FCC, he made disclosures to the Attorney
4 General himself at the Attorney General's office, and even to
5 the Chief of Investigations at New York County District
6 Attorney's office, so even before 2004, before there was any
7 FCC inquiry, he had been developing over years his direct
8 knowledge of this overcharging for intercept provisioning.

9 Then, in 2004, the FCC wants to discuss the statute -- not
10 the statute in question but one of the relevant statutes,
11 CALEA. It had been around by that point for nine years. They
12 want to discuss a wide range of things. The part of it that
13 the defendants have focused on is that in their call for
14 submissions, they want to discuss cost methodology and
15 financial responsibility. And Mr. Prather ended up testifying
16 that by financial responsibility, he thinks -- though this is
17 his facts -- he thinks that the FBI -- he wanted to float the
18 idea of maybe charging a little bit to individual consumers to
19 pay for some of these costs. But that's what he said. Cost
20 methodology and financial responsibility.

21 Placed in context of the fact that Mr. Prather had been
22 for five years trying to get attention to this issue, he went
23 to the people that would be making submissions. Said, I want
24 to put in something about these overcharges. And frankly, the
25 deposition's quite long, there's a lot of papers here, your

1 Honor, but it came out in all that that they didn't really
2 want him to do that at first, that they were going to be
3 talking about all -- the range of issues, this is something
4 they didn't want to talk about.

5 So to the voluntariness issue, he kind of went out of his
6 way -- not kind of, he did go out of his way to make this
7 submission.

8 As to whether or not he was aware of any other submissions
9 made by other sheriffs' offices, if your Honor will recall
10 that's something the defendants point to is that a few others
11 complained of the same thing. Mr. Prather testified under
12 oath -- no basis not to believe this -- that he didn't even
13 know of those until 2012. It's not like he got a copy of
14 everything that was submitted by anyone else.

15 And if your Honor were to contrast, I would say, those
16 submissions with Mr. Prather's affidavit, his is a detailed,
17 eight-page affidavit. He talks about specific companies. He
18 talks about what he believed the prices should have been. And
19 the sheriffs, there seem to be a common letter, I'm unaware of
20 this, but apparently there was some kind of sharing of
21 information, but he didn't see them.

22 So he made his disclosure for five years. But even with
23 regard to the FCC, he made it independently, he made it based
24 not on reviewing any other government disclosures, but with
25 regard to knowledge that he had developed over years

1 unmediated by anything other than his own labor to use the
2 *Wang* decision, 1992 Court of Appeals.

3 And so he qualifies with all of the original source
4 requirements. And the fact that he's a government lawyer,
5 something that the defendants made much hay of, that's a
6 settled issue in this circuit and in other circuits under the
7 *Fine* and the *Hagood* decisions here.

8 Under the *Williams* case in the Eleventh Circuit, you can
9 be not just a government employee, but a government lawyer,
10 and you can still be deemed a relator. The times when
11 somebody's been found not to be a voluntary relator has been
12 essentially where it was going to happen anyway because of
13 government conduct. There's a -- if your Honor recalls the
14 *Barth* decision, where there was a Housing and Urban
15 Development investigator, kind of hunts down this guy, got
16 testimony from him, and then they turned around and become a
17 relator.

18 Or the *Fine* and the *Biddle* decisions, Ninth Circuit, where
19 in *Fine*, the lawyer who wanted to be a relator, he was an
20 auditor in the office of Inspector General. And there's no --
21 his job was to deal with this. I mean, the statutes say your
22 job is to prevent this exact kind of fraud. And in *Biddle*, it
23 was the Navy lawyer who worked on a transaction in question.
24 Both *Biddle* and *Fine*, unlike Mr. Prather, could have stopped
25 the misconduct.

1 Mr. Prather for 14 years, in my opinion, has done all he
2 can to point attention to this. He couldn't indict these
3 defendants. That wasn't his charge. He didn't work in the
4 False Claims Division, if there was one at the Attorney
5 General's office at that time. He disclosed it to everyone he
6 could, based on his personal knowledge, and I think meets he
7 the original source requirement of voluntary. But even after
8 taking some of their argument, a government lawyer under these
9 circumstances can voluntarily disclose, as Mr. Prather did.

10 **THE COURT:** Let me stop you there. For your argument
11 to succeed as a voluntary disclosure, are you then pointing to
12 the events that took place prior to the time that he furnished
13 a written, whatever it was, affidavit?

14 **MR. BALESTRIERE:** Affidavit to the FCC.

15 **THE COURT:** Is it -- are you pointing to that as
16 being significant in terms of the voluntariness of his
17 disclosures?

18 **MR. BALESTRIERE:** Yes, but only part of it.
19 Definitely only part of it.

20 **THE COURT:** So let's take that out for a minute.
21 Let's just take it out. Let's say the only thing that
22 happened here was, of course, he had all of his suspicions by
23 virtue of the fact of his employment. His experiences, you
24 know, with law enforcement. He saw what costs were before, or
25 what the fees -- what the charges were before, what the

1 charges were afterwards, and he said, This is very fishy;
2 these charges are too high. And then he thought to himself,
3 And also, the statute that Congress enacted doesn't permit
4 them to pass on certain costs. And clearly, because I'm, you
5 know, I'm not terminally impeded by common sense, it appears
6 to me that they must be charging for these costs, which would
7 be impermissible. So he comes to all of these conclusions
8 himself. Okay. And his superior or somebody there says, you
9 know, write -- put that in the affidavit. We're having a
10 hearing and I want that information in the affidavit.

11 Let's just assume those facts only for a moment.

12 **MR. BALESTRIERE:** Can I ask that we don't assume the
13 last one, because it's not true. Meaning his supervisor
14 didn't come and say, Let's get this in the affidavit.

15 **THE COURT:** What is true?

16 **MR. BALESTRIERE:** So let's take it up before 19 --
17 excuse me, 2004.

18 **THE COURT:** Take it out.

19 **MR. BALESTRIERE:** For the purpose of this discussion.
20 Though I think it's very relevant in general. There was a
21 call not just to attorneys general, but really to privacy
22 groups, to telecommunications carriers. Just, Let's discuss
23 CALEA. Let's discuss a lot about it. No one says, Let's
24 discuss high charges for intercept provision. No one says, We
25 think there's fraud here. Certainly no one says, We think

1 there's 10 times the charges, which is what Mr. Prather
2 believes that it is, based on his years of experience. He is
3 not the one that is supposed to even respond to that. The
4 Attorney General's office is not that big of a place. He's
5 someone senior. He's aware of this is going on. He goes out
6 of his way to see, is there someone we can see about this.

7 **THE COURT:** So he goes down the hall to the person
8 conducting the litigation, says, You know, you're conducting
9 this litigation, I think something wrong has gone on here.
10 And let me tell you what I think has happened. I think
11 they're passing on their costs of implementation. And, you
12 know, the statute says they can't do that. That's what I
13 think is happening here.

14 And the person says, Well, you know this hearing isn't
15 about that. And he says, Well, you know, this is what I think
16 is going on here. Says, Well, okay, maybe we should include
17 it; maybe we should look into it.

18 That's your -- that's a partial -- that's your version of
19 some of the facts.

20 **MR. BALESTRIERE:** There wasn't a litigation, so it's
21 not like a specific lawyer --

22 **THE COURT:** Wasn't there a hearing or something?

23 **MR. BALESTRIERE:** I think eventually there were
24 hearings that the FCC conducted.

25 **THE COURT:** Or, You should look into it. Prompted

1 him to look into it. Let's just take that. Is that enough?

2 **MR. BALESTRIERE:** It's still voluntary. And there --
3 I'd ask your Honor to look at two decisions they rely on
4 somewhat heavily: *Paranich*, Third Circuit, 2005, and the
5 *Barth* decision, Eighth Circuit 1995. Where in *Paranich* there
6 was a subpoena and the Court said, all indications suggest
7 that the relator would not have come forth otherwise. That
8 but for government action of kind of getting this guy, there
9 would not have been a disclosure.

10 And there's something very similar in *Barth*, which I
11 referenced earlier, where a HUD investigator sought out Barth
12 and said: You -- I want you to tell me certain things.

13 No one came to Chris Prather individually. No one was
14 even specifically asking about the high charges for intercept
15 provisioning. So even if you accept their view that the
16 burden's on us to show, by a preponderance of the evidence --
17 I think your Honor's review of the letters, as well as what
18 Mr. Prather has said, shows that it was voluntary. This was
19 not part of his job. And there again, I would contrast it
20 with *Biddle* and *Fine*, which we discussed earlier, where that
21 was their job. That was exactly what those guys were supposed
22 to do. So we don't want someone like that being a relator.

23 Whereas here we do have a -- five years of history, which
24 I understand, for the purposes of this conversation, we're
25 setting aside, and I think -- but I think it is relevant, your

1 Honor, because it's not like in *Paranich* where, Okay, well, we
2 subpoenaed the guy, we were going to get this information
3 anyway, he had been disclosing it for five years, and then
4 finally saw, okay, here's a chance to get in front of the
5 Feds.

6 And again, it's a long dep, your Honor, but he explained
7 the reasons why there was some reluctance on his part. He had
8 to work with these telecoms. He did not want to tick them
9 off. I think he uses an example and said, They can give you a
10 subpoena response in a day, or they can take two weeks. So he
11 was going through every route he could to make the disclosure.
12 I mean, from a policy perspective, which I think is what
13 original source looks at. Don't we want someone like this
14 who's working hard to make the disclosure, to have the
15 incentive, to continue to come forward here? As opposed to, I
16 don't want a guy like Fine, who actually made --

17 **THE COURT:** Well, I think from a policy point of
18 view, yes, of course, you want people to come forward. But if
19 it's their job to come forward, then we draw a line. Because
20 we say, Are we going to give an added incentive for people
21 just doing their job? Otherwise -- because that's not what
22 the statute is designed --

23 **MR. BALESTRIERE:** I agree.

24 **THE COURT:** The statute is to take a look at people
25 who aren't -- whose job it isn't to come forward, and to get

1 them to come forward.

2 **MR. BALESTRIERE:** I agree.

3 **THE COURT:** That's it. It's not any more complicated
4 than that, from my point of view.

5 **MR. BALESTRIERE:** With regard to voluntariness, I
6 agree. And that's why I'm saying someone like Fine, who I
7 think actually filed multiple false claims based on what he
8 learned as an auditor, we don't want that person, that our tax
9 money goes to, to conduct investigations as an auditor in an
10 office of Inspector General to be a relator. Or the same
11 thing in *Biddle*. Biddle, he was responsible, the lawyer
12 there, your Honor, for the transaction. He could have stopped
13 the fraud. Whereas this was not part of Mr. Prather's job.
14 And -- I mean, he is here, if your Honor wants to ask him any
15 questions.

16 **THE COURT:** No, I don't think that's appropriate.

17 Go ahead.

18 **MR. BLAVIN:** I think it is appropriate to break up
19 the different disclosures which were purportedly at issue
20 here. We have the FCC affidavits, and we have the other
21 allegations that he said certain things to various employees
22 within New York State. The law is very clear that the FCC
23 affidavits are the only ones which are relevant for purposes
24 of the Federal False Claims Act. Disclosures to state
25 employees do not satisfy the voluntary requirement. That was

1 the Jones case from the Sixth Circuit. So in terms of looking
2 at the various submissions, I think it does make sense to
3 first focus on the FCC affidavits, and then we can discuss
4 later the various conversations he had with the New York State
5 Attorney General or any other employees.

6 Now, with respect to the FCC affidavits, the record is
7 indisputably clear here that he prepared these at the explicit
8 direction of the head of the telecoms bureau at the New York
9 Office of the Attorney General. He initially did come
10 forward, said, I want to do this; can I do this. They said,
11 No, you can't do this. It was only when Miss Werling, the
12 head of the telecom bureau, explicitly said to him, Please do
13 this that he did it. The testimony on this --

14 **THE COURT:** So let me just stop you there. So you're
15 saying that what he should have done at that point, if he
16 wanted to qualify as a relator, he should have quit and leave
17 the office and then reported to whomever he would report to,
18 publicly or otherwise, about what he had seen? And if he had
19 done that, he then arguably would have been a relator?

20 **MR. BLAVIN:** Well, the question, your Honor,
21 raises -- directly goes to why it's so difficult for
22 government employees to be relators.

23 **THE COURT:** But you haven't answered the question.

24 **MR. BLAVIN:** To qualify as an original source in that
25 circumstance, to make sure that his submission was not part of

1 his job responsibilities at the time, that may have been an
2 option for him. But if you look at the record here with
3 respect to these specific affidavits, the testimony is clear.
4 He said in his deposition that Miss Swerling said, I think --
5 I think maybe we would put in an affidavit about overcharging.
6 Can you do that affidavit for us? He did that affidavit as
7 part of his official responsibilities and as a deputy attorney
8 general. He submitted them in support of the New York
9 Attorney General's submission to the FCC. He did it during
10 work hours in exchange for a salary, with the assistance of
11 other employees at the New York Attorney General's office.

12 If you look at the Ninth Circuit law on this, it's clear
13 that it falls within the scope of the *Biddle* case, which cited
14 that only some aspect of the job responsibilities have to
15 involve the disclosure of fraud. It falls within the *Fine*
16 case, which said it just has to be, quote, an
17 employment-related obligation in exchange for a salary.

18 He testified at his deposition that this was part of his
19 job. He said that going and complaining about charges he
20 thought fell within his responsibilities. In his affidavits
21 submitted to the FCC, he said that the OCTF, where he worked,
22 regularly complained about charges to the carriers. This
23 clearly falls within the scope of his job responsibilities,
24 within the Ninth Circuit law on this, and those submissions to
25 the FCC were an employed-related obligation, and they do not

1 constitute a voluntary submission to the FCC. They were part
2 of his job. In fact, in the *Biddle* case itself it noted -- it
3 discussed, Well, you know, there's the governing regulations
4 as to what one's job responsibilities may be. It noted that,
5 quote, Biddle supervisors may direct him to perform certain
6 specific tasks. Clearly that would fall within an employment
7 related obligation.

8 That's exactly what happened here with respect to the FCC
9 affidavit. Miss Swerling asked him, Can you do this. He did
10 it as part of his job in support of an official submission by
11 the New York Attorney General's office to the FCC. This is
12 not like the Hagood case at all, where it's clear no one had
13 requested -- none of the supervisors or superiors had
14 requested that the employees submit that information to the
15 government. Here it's -- you know, the record speaks for
16 itself. He was told to do this as part of his job. He did it
17 as part of his job. He was paid to do it.

18 **MR. BALESTRIERE:** May I respond regarding *Biddle* and
19 *Fine*, your Honor?

20 **THE COURT:** Sure.

21 **MR. BALESTRIERE:** Because we're -- with respect, I
22 think Mr. Blavin is wrong, and obviously your Honor can read
23 the decisions, but in *Biddle*, the lawyer there had to abide
24 by -- and it's in our papers -- federal acquisition
25 regulations -- it's 48 CFR Section 1.602 -- which said that he

1 was responsible for safeguarding the interest of the United
2 States in his contractual relationships. So *Biddle* is this
3 contract lawyer working on a deal where the United States is a
4 party to it. His -- the specific statute that applies to him,
5 contrasted with the New York executive law, says, you, Biddle,
6 are responsible for safeguarding the interests of the United
7 States. So the specific law that applies to him obligated
8 him, no conversations with supervisors needed, to do what he
9 did, and I'll talk about the conversations in an a second.

10 With regards to *Fine*, the Court said that Fine's paramount
11 responsibility was his duty to disclose fraud to his
12 supervisors. It was required by the very terms of his
13 employment, as opposed to here. And, as Mr. Blavin said in
14 the very beginning of what he said, Mr. Prather went to
15 Miss Werling, who eventually worked at Verizon at some point,
16 that he wanted to make the submission, and they said no. I
17 think this goes to show how -- he convinced them to say, Can I
18 include this?

19 **THE COURT:** Let me ask Mr. Blavin a question. So
20 let's say you have a worker, works for the government, as a
21 secretary in a U.S. Attorney's office. And he sees some --
22 he's not a line lawyer -- maybe a lawyer or not. Doesn't have
23 to be a secretary. Lawyer. Works in Department X. And he
24 sees something that is improper, a violation of -- what
25 appears to him to be a clear violation of the contract. He

1 goes to someone there. He says, You know, I see this going
2 on, and, you know, I saw this, I saw this thing, because I saw
3 them -- whatever it was, so on so forth -- this is fraud.
4 Fraud is being committed against the government. And so the
5 person says, Hey, write a report. You know, set it all out.
6 Tell us what you saw, why you say you think it's a fraud. And
7 that person says, I don't want to get involved. You know,
8 that's not my job. I don't want to get involved. I'm not
9 writing any report.

10 Fired? Do we fire that person? Because the job requires
11 compliance -- you know, a supervisor saying or somebody
12 saying, You see something in which your employer is being
13 defrauded, please write it out, and you say, No -- can I fire
14 that person? Can I terminate that person? Can I take any
15 disciplinary action against that person? Can I force that
16 person as a, quote, condition of the job: You want to stay
17 here, you write that report? I don't want to write that
18 report.

19 What about all that? Is that -- putting it another way,
20 you say it's part of the person's job. Is it really?

21 **MR. BALESTRIERE:** No.

22 **MR. BLAVIN:** Well --

23 **THE COURT:** You say, Yes, it is. And I guess if you
24 say, Yes, it is, and the person doesn't do it, they're out of
25 here. They can be. They're fired.

1 So in other words, if Mr. Prather didn't write that
2 document or wasn't willing to cooperate and wasn't willing to
3 furnish that information, in your view, he could have been
4 terminated, because it was part of his job to do so. Is that
5 the argument? Or have I missed it.

6 **MR. BLAVIN:** That's not the argument your Honor. The
7 argument is, you have to look at the specific submissions made
8 to the government and determine whether or not they fell
9 within the scope of his job responsibility. That's what the
10 governing law says. Here, it's clear that they did fall
11 within the scope of his job responsibilities. This is not an
12 independent submission.

13 **THE COURT:** So the circumstances don't make a
14 difference. The circumstances being whatever was occurring
15 around it, you look at what he did and was that part of his
16 job. And you say, what he did was submit this document or
17 documents, was that part of his job? Yes. And that's the end
18 of the inquiry. Is that right?

19 **MR. BLAVIN:** The Ninth Circuit says it just has to be
20 some aspect of his job responsibilities. That's the language
21 from the Biddle decision.

22 **THE COURT:** And if he didn't do it, he could be
23 fired?

24 **MR. BALESTRIERE:** As saying before, do we want
25 someone to quit and file a false claim? I don't think *Biddle*

1 and *Fine* could have anyway, because they came to their
2 information in the course of their duties. It was their job
3 to ferret this out. But you're right to bring up, is this --

4 **THE COURT:** That's not his job.

5 **MR. BALESTRIERE:** No, it's not.

6 **THE COURT:** You're not arguing, are you, that this
7 was -- that he came into this information -- or maybe you
8 are --

9 **MR. BALESTRIERE:** They did at one time.

10 **MR. BLAVIN:** I'm sorry, what's the question?

11 **THE COURT:** Good point. What's the question. That
12 it was -- that he came into this information by virtue of his
13 job obligations. The costs, the overcharges.

14 **MR. BLAVIN:** He alleges that he reviewed various
15 documents. He initially said that he reviewed hundreds of
16 invoices in his complaint, which was subsequently revised to
17 two to five, and this goes to the direct and independent
18 knowledge, your Honor, which is an independent prong of the
19 original source requirement, and I don't want to lose that
20 because I think the record is very clear that he does not
21 satisfy that.

22 So I know we've been talking about voluntariness, but he
23 also needs to establish that he had direct and independent
24 knowledge. He reviewed a handful of invoices. He doesn't
25 remember who they were from, whether or not they involved any

1 of the defendants. He doesn't know even what rates were at
2 issue. He says he looked at the OCTF budget. All of these
3 are pricing related documents. There's no evidence of any
4 direct and independent knowledge of any fraud. He received
5 all of this information secondhand from other employees in his
6 office. None of it was directed. Unmediated. Anything
7 else -- the law is very clear, you're receive something from a
8 co-employee, that's not direct and independent knowledge. All
9 he did was he looked at these documents over the shoulders of
10 others, as he testified, from other people, talking to people
11 who were responsible for the budget, and he said, Oh, these
12 prices seem high to me. Based upon my background and
13 expertise and the years that I've worked, that looks like
14 fraud.

15 That does not satisfy the direct and independent knowledge
16 requirement of the False Claims Act. The -- in *A-1 Ambulance*,
17 the Ninth Circuit was very clear that just using your
18 background or expertise to take information that was in the
19 public domain does not constitute direct and independent
20 knowledge. He testified at his deposition that he was
21 absolutely not uniquely qualified to bring the suit, that many
22 other prosecutors across the country would have known these
23 charges, they would have seen that evidence, and he just said,
24 but based upon my expertise, I know that this isn't costing
25 what it should have cost. At the last hearing, your Honor,

1 you explicitly said -- I'm sorry.

2 **THE COURT:** Show some mercy.

3 **MR. BLAVIN:** I appreciate that, your Honor.

4 You explicitly said that just looking at documents and
5 saying this doesn't cost what I think it should cost is not,
6 in my mind, direct and independent knowledge of fraud.

7 And that's exactly what the evidence here is. And the
8 Ninth Circuit and your Honor confirmed that that does not
9 constitute direct and independent knowledge of fraud.
10 Moreover, it was entirely secondary, received from other
11 employees at the office, from purported conversations with the
12 employees.

13 In the *Devlin* case, the Ninth Circuit explicitly said, you
14 talked to the defendant's employees, you have interviews or
15 letters from them. That's not direct and independent
16 knowledge. You have to gain that knowledge yourself, with
17 your own eyes. But moreover, all of this is entirely vague
18 and speculative.

19 In his amended complaint, which your Honor instructed him
20 to put everything in, that, you know, that establishes that
21 you're an original source, claimed: I reviewed hundreds of
22 invoices. He said that to various government agencies at the
23 time that he was trying to get them to join this lawsuit. At
24 his deposition he said, No, two to five, maybe. Those
25 allegations in the amended complaint aren't right. Those

1 letters that I sent to other attorney generals' offices trying
2 to get them to join this False Claims Act, no, I didn't review
3 hundreds. Two to five, maybe.

4 With respect to those two to five invoices he reviewed,
5 doesn't know anything about them.

6 **MR. BALESTRIERE:** May I --

7 **MR. BLAVIN:** There's other allegations I'd like to
8 respond to as well. He says that he has knowledge of the OCTF
9 equipment. How does that establish any direct and independent
10 knowledge of fraud, of what the defendant's internal expenses
11 are? That's what the relevant statute says. He says he has
12 no idea what the defendant's internal costs are. He says, I
13 have no idea what technologies they use. This is in all his
14 deposition. The fact that he knows what equipment the OCTF
15 uses, it's entirely irrelevant to whether or not he can
16 actually establish some sort of fraud in this case.

17 **MR. BALESTRIERE:** Your Honor, may I?

18 **THE COURT:** Sure.

19 **MR. BALESTRIERE:** Okay. With regards to
20 voluntariness, which we've seem to have somehow moved on from,
21 look at *Fine*, please. Look at those decisions. I think we're
22 dealing with voluntary.

23 With regards to direct, I heard a lot of tone over here,
24 but if your Honor were to look at the deposition testimony,
25 Mr. Prather corrected himself with regards to the number of

1 the invoices. He volunteered it very early in the deposition
2 testimony. They actually refused to go along with him putting
3 in an amended pleading on that point when he wanted to correct
4 it, but he didn't say a few or two invoices, or I saw 200 and
5 that's how I knew. He said, and has consistently said over
6 the course of decades, you -- look at the *Wang* decision, 1992
7 Court of Appeals, two weeks when someone obtained enough
8 information. The *Devlin* case does say, with your own eyes,
9 you review. He says he had seen the OCTF budget, which first
10 put him on notice when he thought, as it said in the
11 deposition, \$400, that just sounds like a lot when to his
12 knowledge, wires cost about \$200, and then he saw at that
13 point they were going for around 2,000.

14 With regards to him not going the details, as he freely
15 admitted at his deposition of the internal cost structure of
16 the defendants, not only do only they know that, which almost
17 helps us when the fact is that he did know and could say that
18 after CALEA was passed, it was literally flicking a switch,
19 and Mr. Prather went into pages of deposition testimony where
20 he talked about how it was done before, because he was aware
21 of it, where someone would have to go to a telephone pole,
22 climb up, put on a device called a slave, go back down into
23 the car, and drive back to the, at the time, your telephone or
24 whomever's headquarters.

25 **THE REPORTER:** Can you slow down, please?

1 **MR. BALESTRIERE:** Whereas after CALEA, after our
2 government paid half a billion dollars to these defendants to
3 help them upgrade their systems, it should just take the flick
4 of a switch. So he doesn't need to know how much did that
5 flick of a switch cost. Two cents, \$2. I don't know. Has a
6 good faith basis to say -- or we're more arguing under the OCC
7 SSA, under the CFR provisions we cite in the complaint and in
8 our papers: How is the reasonable expense of that result in
9 you increasing by 10 times what you charged? He goes into
10 detail how he knew this. He talks about how he did see some
11 invoices, how he did speak to other people in the office, but
12 over a period of time. He is not getting this secondhand. He
13 doesn't need to be uniquely qualified, as Mr. Blavin says.
14 There's no false claim statute, nor the federal one, that
15 requires you to be the only person that would have been --
16 could have been the whistleblower here. Sure, in 2004, maybe
17 before, someone else could have disclosed. But it was
18 Mr. Prather who did.

19 We are saying that he is somewhat unique in terms of his
20 term of service. That he saw all these prices before. And
21 someone new at the U.S. Attorney's office now doesn't see it,
22 but it's not entirely secondary. We have to show, even if you
23 accept our argument, that this is still a jurisdictional
24 question which -- even if you accept the defendant's argument,
25 that we have a burden of proving by a preponderance -- I think

1 actually they do, under the 2010 amendments -- but either way,
2 we show, at least by a preponderance of the evidence, based on
3 the testimony of the -- the only person's testimony we really
4 have here, Mr. Prather, that he worked there for years, that
5 he saw all these things, that he came into this knowledge from
6 various jobs, that it was unmediated by his own labor. Though
7 I would point out the *Cooper* decision your Honor, Eleventh
8 Circuit 1994, and the *Dodge* decision, Middle District of
9 Florida 2009, where those courts said, If you conduct a due
10 inquiry, well, good for you. I mean, we don't want you
11 rushing off and complaining about misconduct if there's really
12 no basis for it. Mr. Prather didn't need to actually conduct
13 a further investigation, given his many years and knowledge.

14 **THE COURT:** Let me give you the opportunity to
15 respond. Okay?

16 **MR. BLAVIN:** Thank you, your Honor. Now, with
17 respect to the fact that the costs went up, that was
18 observable by anyone. He said any prosecutor in the country
19 would have known that. The point of the original source test
20 is that you do not want to provide a benefit to those who do
21 nothing for the government. I mean, at this point, anyone
22 within the government could have brought this claim that would
23 have known, Hey, the prices have gone up, as the relator
24 himself testified.

25 **THE COURT:** Do you have to be uniquely situated to

1 bring this?

2 **MR. BALESTRIERE:** No.

3 **MR. BLAVIN:** You have to have direct and independent
4 knowledge of fraud. You have to be a close observer of the
5 fraud. Just seeing prices have gone up when the relator
6 himself testified that there had been a revolutionary change
7 in the technology at issue doesn't establish any kind of
8 direct and independent knowledge of any fraud. It's just cost
9 documents. If you look at the decisions we cite in our
10 papers, your Honor, they repeatedly hold that knowledge of a
11 transaction, knowledge that costs may differ between different
12 entities, does not establish direct and independent knowledge
13 of fraud. In the *Reagan* case, which is affirmed by the Fifth
14 Circuit, the purported relator there said, Well, I looked at
15 these invoice and I said, Hey, these are higher than what
16 other people are charging. That seems wrong to me. The Court
17 said, That's not direct and independent knowledge of any
18 fraud.

19 If you look at the other decisions we cite, the *Aflatooni*
20 case from the Ninth Circuit, the Court said, Well, the fact
21 that you may think that there's certain auditing deficiencies
22 when you look at these transactions, that doesn't satisfy the
23 direct and independent knowledge test. It's something more.

24 And that's why the courts repeatedly have said -- the
25 Ninth Circuit in the *Wayne* case said, that the paradigm qui

1 tam plaintiff is the whistle-blowing insider. Because they
2 observe the fraud with their own eyes, unmediated by anything
3 else. In the *Wayne* case, the person was an employee for the
4 defendant. Same with the *Barajas* case.

5 And your Honor, just quickly, if I may respond on the
6 voluntary prong, just to the other submissions to the New York
7 State --

8 **THE COURT:** Right.

9 **MR. BLAVIN:** -- officials. Just quickly on that,
10 your Honor.

11 One, as noted, they don't qualify for the Federal False
12 Claims Act.

13 Two, they were entirely vague and speculative. Nothing
14 substantiating any kind of fraud. Just more of: I think
15 these costs are high. The record shows that.

16 Three, Title IX of the New York Code, its rules and
17 regulations, which we said in our paper, which relator
18 conceded applied to him. Said, Yeah, I have a duty to report
19 vendor fraud when I see it. He was looking at these invoices,
20 approving them. The rule that their saying is, Well, no, he
21 didn't have the duty within his responsibilities to say, I
22 thought that this was overcharging. He was looking at these
23 invoices himself. It's part of his job responsibilities.

24 And Title 15 of the New York Code, which relator conceded
25 applies to him, says the very same thing.

1 Also, he was an attorney for the State of New York. The
2 New York Code of Professional Responsibility said he had a
3 duty to his client to disclose if he thought that the
4 government, the state government, was being defrauded by
5 people who were providing the services to it. He testified in
6 his deposition he thought that that was part of his job.

7 **THE COURT:** So that would mean that any attorney
8 working at any entity who is providing legal services to that
9 entity couldn't become a whistleblower.

10 **MR. BALESTRIERE:** Exactly, and that's not --

11 **THE COURT:** Doesn't it? Doesn't it mean that? If
12 you say, Well, his fiduciary duty -- I don't disagree with
13 you, by the way. I think there is a fiduciary responsibility;
14 I understand that. But doesn't that argument prove too much?
15 Doesn't it then exclude -- maybe you're right. In other
16 words, that's it. You know, whatever they say. QED. That's
17 the end of the -- that's it. There we are. And he's an
18 attorney. He's working there. He has a fiduciary duty to his
19 client. This is his client. End of inquiry.

20 **MR. BLAVIN:** Well, your Honor, in this circumstance,
21 he was purportedly reviewing invoices for payment.

22 **THE COURT:** It's heavy attorney. Attorney plus. Not
23 attorney light. Okay.

24 **MR. BLAVIN:** And you have Title IX, and the fact
25 that --

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